

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 471178 and
MERCHANT MARINER'S DOCUMENT Z-576040
Issued to: Joseph Warren HOMER

DECISION OF THE VICE COMMANDANT
UNITED STATES COAST GUARD

2177

Joseph Warren HOMER

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 12 June 1978, an Administrative Law Judge of the United States Coast Guard at Boston, Massachusetts, after a hearing at Boston, Massachusetts, on 20 April 1978, suspended Appellant's license for a period of two months and further suspended it for one month on probation for 12 months. The two specifications of the charge of negligence found proved allege (1) that Appellant, while serving as Master aboard Tug KING PHILIP, under authority of the captioned documents, did on 1 April 1978, attempt to transit Cape Code Canal without assessing properly the effects that the tidal current in the Canal would have on his vessel and its tow, Tank Barge RHODE ISLAND; and (2) in that Appellant, while serving as aforesaid, did ground the Tank Barge RHODE ISLAND; and on the northern edge of Cape Cod on 1 April 1978.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and specifications.

The Investigating Officer introduced into the evidence the testimony of one witness and eleven documents.

In defense, Appellant introduced into evidence the testimony of two witnesses, his own included, and one document.

Subsequent to the hearing, the Administrative Law Judge entered a written decision in which he concluded that the charge and both specifications as alleged had been proved. He then entered an order of suspension for a period of two months and further suspension of one month on probation for twelve months.

The decision was served on 13 June 1978. Appeal was timely filed on 15 June 1978, and perfected on 27 October 1978.

FINDINGS OF FACT

On 1 April 1978, Appellant was serving under authority of his duly issued Coast Guard license as master of the Tug KING PHILIP, which was made up to T/B RHODE ISLAND along the port quarter of the latter vessel. Early that morning Appellant's flotilla was proceeding generally easterly through the Cape Cod Canal, making approximately six knots through the water. Weather conditions were excellent with a slight breeze from the southwest. At approximately 0525, with the tidal current running against his flotilla at nearly four knots, Appellant sought and received permission from the Marine Traffic Controller at the Buzzards Bay Control Station, to move from the south side of the Canal to the north side. It was Appellant's intention to take advantage of what he anticipated would be a lesser opposing current on the opposite side of the canal at a point about 2,000 yards ahead. At approximately 0530, he commenced a "crabbing" movement to port. Upon reaching his desired position, Appellant attempted to steady up but was unable to do so, despite the application of full right rudder. Within moments he reversed his engines; nevertheless, the Tank Barge struck the rip rap on the north side of the Canal. As a result the Tank Barge was holed and a substantial quantity of No. 2 heating oil lost.

BASIS OF APPEAL

This appeal has been taken from the decision and order of the Administrative Law Judge. It is contended that there is insufficient evidence in the record to support the charge and each specification thereof.

APPEARANCE: Glynn & Dempsey, Boston, Massachusetts, by Richard A. Dempsey, Esq.

OPINION

I

Appellant argues correctly that the record does not establish that he failed to examine the available publications to determine the predicted tidal current velocity in the Canal prior to entering the Canal. If anything, the record establishes the opposite, that he properly did consult and rely upon the published sources. Appellant was not charged with failure to consult the appropriate publications; rather, he was charged with attempting to transit the Canal without assessing properly the effects of the tidal current. The specification, if read rather narrowly, might be construed as charging Appellant only with failing to consult the pertinent publications before ever entering the Cape Cod Canal. However, it is clear from the record that Appellant was found culpable for his failure to assess properly the effects of the tidal current the Canal from the southern side to the northern. At that moment he

should have benefitted both from knowledge of the current predictions and from his experience of several hours maneuvering of the tug and its tow. Nevertheless, he commenced an ill-conceived maneuver from which he was unable to recover. Since the meaning of the specification, even if, perhaps, ambiguous, was made clear during the hearing, I discern no reason for rejecting it. I might note, however, that the first specification is somewhat multiplicitous in that, to an extent, it is subsumed by the second specification. As discussed more fully infra, proof that Appellant grounded his flotilla, absent satisfactory explanation, raises a rebuttable presumption of negligence. If it be conceded that Appellant did not ground his flotilla intentionally, this presumption properly can be said to support a finding of both "cause" and "effect." In Code this instance, the "cause" was Appellant's attempt "to transit Cape Cod Canal without properly assessing [sic] the effects that the tidal current in the Canal would have on [his] vessel and its tow, Tank Barge RHODE ISLAND." The "effect" was the actual grounding, from which the rebuttable presumption arose. Hence, it was not necessary to charge Appellant with the first specification since, by implication, it already was included within the second. Because the order of the Administrative Law Judge specifically was fashioned with regard to the resultant holing of the barge and spilling of its cargo of oil, any multiplicity inherent in these two specifications has not prejudiced Appellant.

II

That Appellant's flotilla grounded while transiting a well-charted canal creates a rebuttable presumption of negligence and suffices to make a prima facie case of negligence against Appellant. Decisions on Appeal Nos. 579, 1131, 1200, 2113. While not shifting the burden of proof from the Investigating Officer, this presumption required Appellant to come forward with evidence sufficient to rebut it. This Appellant attempted, both through his own testimony and that of a witness who was much experienced in transiting the Canal. Nevertheless, Appellant's explanation of the cause of the grounding, "unknown bottom conditions," was rejected by the Administrative Law Judge as being insufficient to overcome the previously created presumption. Upon this record, I am unable to conclude that the Administrative Law Judge erred in rejecting Appellant's admittedly plausible explanation and in finding the presumption of negligence un rebutted.

In his opinion, the Administrative Law Judge concluded "that the Barge went aground at the north side of the Canal because [Appellant] failed to take into account that the flow of current would be increasingly greater as he passed from the south to the north side of the Canal. The current gradient was created by the curvature of the Canal in the vicinity of the Railroad Bridge, and

as the flotilla headed into increasingly greater current, that force on the starboard bow of the Barge tended to force it into the Canal bank, causing it to ground." I question whether the record supports, by substantial evidence, a conclusion that this one factor primarily caused the grounding. In any event, since the Administrative Law Judge specifically rejected Appellant's explanation and did rely upon the unrebutted presumption in finding Appellant negligent, there was not harm to Appellant in the Administrative Law Judge's attempt to distil from the entire record a surmise as to precisely how Appellant had acted negligently. I must stress, however, that I find the charge of negligence proved solely upon the basis of the unrebutted presumption, not the additional surmise of the Administrative Law Judge.

ORDER

The order of the Administrative Law Judge, dated at Boston, Massachusetts, on 12 June 1978, is AFFIRMED.

R.H. SCARBOROUGH
VICE ADMIRAL, UNITED STATES COAST GUARD
VICE COMMANDANT

Signed at Washington, D.C. this 3rd day of Jan. 1980.

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persuasive evidence.